Supreme Court, U. S.
FILED
MAR 21 1977
MICHAEL RODAK, JR., CLERK

In the

# Supreme Court of the United States

October Term, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

*Appellant,*

v.

MERREL CLINE and L. R. BRETZ,

*Appellees.*

**Appeal from the United States Court of Appeals For the Ninth Circuit**

## MOTION TO AFFIRM BY APPELLEE L. R. BRETZ

CHARLES F. MOSES
Moses, Tolliver & Wright
The Terrace, Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103

*Attorneys for Appellee L. R. Bretz*

In the

# Supreme Court of the United States

October Term, 1976

No. _____

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

*Appellant,*

v.

MERREL CLINE and L. R. BRETZ,

*Appellees.*

**Appeal from the United States Court of Appeals For the Ninth Circuit**

## MOTION TO AFFIRM BY APPELLEE L. R. BRETZ

Appellee L. R. Bretz moves to affirm the judgment sought to be reviewed on appeal from the federal court *(Cline and Bretz v. State of Montana*, (9th Cir. 1976) 546 F.2d 1336) on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

## ADOPTION OF APPELLEE CLINE'S MOTION AND BRIEF

Appellee Bretz here adopts by reference the motion to dismiss or affirm and supporting authorities thereon filed by Cline. Bretz will not repeat the same here.

Rule 16, Supreme Court Rules in part states:

"Within thirty days after receipt of the jurisdictional statement . . . , the appellee may file a printed motion . . . to affirm.

"The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

The question here is whether Montana, by statute, has the right to change the Constitution of the United States as interpreted by the Supreme Court.

As noted by every United States Supreme Court decision, by all Federal Court decisions, by the decisions of every other state with the exception of Arizona, and now Montana, Fifth Amendment double jeopardy protection attaches when a jury is empanelled and sworn and not when a witness has been sworn and testified. (See citations in Appellee Cline's brief.) *Serfass v United States,* 420 U.S. 377 is the latest Supreme Court decision.

Montana has no right to change this constitutional right by legislation. In fairness to the Montana Legislature, we note that its law which defines the point when jeopardy attaches (*95-1711, R.C.M. 1947*) as after when the first witness has been sworn and testifies, was copied from a Model Penal Code



provision which was first proposed when *Palko v. Connecticut* (1937) 58 S.Ct. 149, 302 U.S. 319, 87 L.Ed. 288 was the law of the land holding that the Fifth Amendment did not control the states, and before *Palko* was specifically overruled in *Benton v. Maryland,* (1969), 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, holding that:

> "The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut is overruled.
>
> "Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as Betts v. Brady, 316 US 455, 86 L Ed 1595, 62 S Ct 1252 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was 'shocking to the universal sense of justice.' Id., at 462, 86 L Ed at 1602. It relied upon Twining v. New Jersey, 211 US 78, 53 L Ed 97, 29 S Ct 14 (1908), which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. Betts was overruled by Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733 (1963); Twining, by Malloy v Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489 (1964), Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness'. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice', Duncan v Louisiana, supra, at 149, 20 L Ed 2d at 496, the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable."

*Missouri Pacific Railway Company v. Castle*, (Neb. 1912), 32 S.Ct. 606, 224 U.S. 541, 56 L.Ed. 875, has the answer appropriate to this case in holding that "The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary." *Hodges v. Snyder*, (1923) 43 S.Ct. 435, 261 U.S. 600, 67 L.Ed. 819, confirms this by its holding that this motion to affirm "should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument". See also *City of Boston v. Jackson*, (Mass. 1922), 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274 holding that "when the questions presented on such a motion are found by the court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case."

After *Benton* and *Serfass* this question is hornbook law.

Respectfully submitted March 18, 1977.

CHARLES F. MOSES
MOSES, TOLLIVER & WRIGHT
The Terrace, Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103



**CERTIFICATE OF SERVICE**

I certify that three copies of this Motion to Affirm were served by mail on:

Mike Greely
Attorney General of Montana
Robert S. Keller,
Special Assistant Attorney General
State Capitol
Helena, Montana 59601

*Attorneys for Appellant*

W. William Leaphart
The Leaphart Law Firm
1 North Last Chance Gulch No. 6
Helena, Montana 59601

*Attorneys for Appellee*
*Merrel Cline*

on March 18, 1977.

CHARLES F. MOSES